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9
10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

12 In re

13 Howrey LLP,

14 Debtor.

Case No. 11-31376-DM

(Involuntary Chapter 7)

**MOTION OF CITIBANK, N.A. FOR
ENTRY OF AN ORDER
(A) CONDITIONING THE USE OF
CASH COLLATERAL AND
PROVIDING ADEQUATE
PROTECTION WITH RESPECT
THERETO AND (B) GRANTING
CERTAIN RELATED RELIEF**

Date: May 12, 2011

Time: 2:30 p.m.

Place: Courtroom 22
235 Pine Street, 19th Floor
San Francisco, CA 94101

Judge: Hon. Dennis Montali

22 **TO: THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY**
23 **JUDGE; ALL CREDITORS AND OTHER PARTIES IN INTEREST; AND THE**
24 **UNITED STATES TRUSTEE**

25 Citibank, N.A. ("Citibank"), as a secured creditor, hereby moves, by and through
26 its undersigned counsel, this Court on an emergency basis (the "Motion") for entry of an order
27 (the "Order"),¹ on an interim and final basis, substantially in the form attached hereto as Exhibit

28 ¹ Capitalized terms used and not defined herein shall have the meaning ascribed to them in the Order.

1 A, pursuant to section 363 of title 11 of the United States Code (the “Bankruptcy Code”), (i)
2 conditioning the use by Howrey LLP, the above-captioned debtor (“Howrey” or the “Debtor”),
3 of Cash Collateral and other Pre-Petition Collateral in which Citibank has an interest; (ii)
4 providing adequate protection to Citibank for, among other things, Howrey’s use of Cash
5 Collateral; (iii) vacating and modifying the automatic stay imposed by section 362 of the
6 Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of
7 the Order; and (iv) scheduling a final hearing (the “Final Hearing”) to consider the relief
8 requested in the Motion on a final basis. In support of this Motion, Citibank respectfully
9 represents as follows.

10 JURISDICTION

11 1. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C.
12 §§ 157 and 1334(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). The
13 statutory bases for the relief requested herein are sections 105(a), 361, 362 and 363 of the
14 Bankruptcy Code and Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the
15 “Bankruptcy Rules”).

16 RELIEF REQUESTED

- 17 2. Citibank requests entry of interim and final orders:
- 18 a. conditioning the Debtor’s use of Cash Collateral and other Pre-
19 Petition Collateral strictly to the Budget (subject to the Permitted
20 Variance) and the terms of the Order;
 - 21 b. granting replacement liens in the Post-Petition Collateral, including
22 the Debtor’s Foreign Cash and any Excess Cash, and allowed
23 superpriority administrative expense claims to Citibank as
24 adequate protection against any diminution in the value of the Pre-
25 Petition Collateral, including Cash Collateral, as result of the
26 Debtor’s use thereof and the imposition of the automatic stay, but,
27 in each case, subject to existing liens having priority over the Pre-
28 Petition Liens, certain foreign liquidation or receivership
proceedings and a professional fee carve out (see *Interim Order* at
paragraphs 4 & 8)²;

2 ² Citibank reserves the rights to seek replacement liens on avoidance actions at the Final Hearing on the Motion.

- 1 c. allowing for the payment of post-petition interest and fees and
2 expenses of attorneys, accountants, financial advisors and other
3 professionals to Citibank, subject in all respects to the
4 recharacterization of such payments as principal payments under
5 Section 506(b) of the Bankruptcy Code in the event it is
6 determined by final order that Citibank is undersecured (see
7 *Interim Order* at para. 5);
- 8 d. authorizing Citibank to apply funds in the Operating and Suspense
9 Accounts towards the repayment of the principal amount of the
10 Pre-Petition Debt in amounts agreed to by the Debtor as well as to
11 make the L/C Reimbursement Payment (see *Interim Order* at
12 paragraphs 2, 5 & 7) ;
- 13 e. vacating and modifying the automatic stay imposed by section 362
14 of the Bankruptcy Code to the extent necessary to implement and
15 effectuate the terms and provisions of the Order (see *Interim Order*
16 at para. 7);
- 17 f. scheduling a Final Hearing to consider entry of the Order granting
18 the relief requested herein on a final basis and approving the form
19 of notice with respect to the Final Hearing;
- 20 g. providing for the immediate effectiveness of the Interim Order;
21 and
- 22 h. granting to Citibank such further relief as is just and proper.

23 **BACKGROUND**

24 3. The Debtor is a limited liability partnership organized under the laws of
25 the District of Columbia. On April 11, 2011, certain putative creditors (the "Petitioning
26 Creditors") of the Debtor filed an involuntary petition against the Debtor under chapter 7 of the
27 Bankruptcy Code (the "Involuntary Case") in the Bankruptcy Court for the Northern District of
28 California, San Francisco Division (the "Court"). On May 3, 2011, the Debtor filed a motion to
dismiss the Involuntary Case, or alternatively, to transfer venue of the Involuntary Case (the
"Motion to Dismiss").³ The hearing on the Motion to Dismiss, however, is not scheduled for a

³ Citibank submits that the Court should enter the Order notwithstanding the pending Motion to Dismiss because it is essential that Citibank's interests in the Pre-Petition Collateral, including Cash Collateral, are adequately protected pending the Court's determination of the Motion to Dismiss. In the event the Court dismisses the Involuntary Case or transfers venue to another district, Citibank intends to seek similar relief in any such future proceeding.

1 hearing until June 8, 2011. The Debtor stated in the Motion to Dismiss that it intends to file a
2 voluntary petition under chapter 11 of the Bankruptcy Code.

3 4. The Debtor is a party to: (a) the Fourth Amended and Restated Secured
4 Loan Agreement dated as of October 19, 2010 by and between Howrey and Citibank, as Lender,
5 as amended by a First Amendment thereto dated as of December 3, 2010, and as further amended
6 by a Second Amendment thereto dated as of December 20, 2010 (as so amended, the "Pre-
7 Petition Financing Agreement"); (b) the Fourth Amended and Restated Security Agreement
8 dated as of October 19, 2010 made by and among Howrey, The CapAnalysis Group, LLC
9 ("CAG"), and Maxiam, LLC ("Maxiam"), as Grantors, in favor of Citibank; (c) the Continuing
10 Guaranty of Firm Affiliate (General Indebtedness) dated as of October 19, 2010 made by CAG
11 in favor of Citibank (the "CAG Continuing Guaranty"); (d) the Continuing Guaranty of Firm
12 Affiliate (General Indebtedness) dated as of October 19, 2010 made by Maxiam in favor of
13 Citibank (the "Maxiam Continuing Guaranty", and together with the CAG Continuing Guaranty,
14 collectively, the "Guaranties"); (e) the New \$20,000,000 Note dated as of December 20, 2010 for
15 \$20,000,000 executed by Howrey in favor of Citibank; (f) the 364-Day Note dated as of
16 December 20, 2010 for \$60,000,000 executed by Howrey in favor of Citibank; (g) each other
17 "Note" (as defined in the Pre-Petition Financing Agreement) from time to time issued by
18 Howrey in favor of Citibank; and (h) each other "Loan Document" as defined in the Pre-Petition
19 Financing Agreement (collectively, the "Pre-Petition Financing Documents").

20 5. Under the Pre-Petition Financing Documents, certain loans, advances and
21 other extensions of credit were made by Citibank to Howrey (including the issuance of Letters of
22 Credit for the account of Howrey). As of the Filing Date, the principal amount of loans
23 outstanding under the Pre-Petition Financing Documents is estimated to be approximately
24 \$57,427,506.78, together with all interest, fees, undrawn Letters of Credit, reimbursement
25 obligations in respect of drawn Letters of Credit, swap obligations and other amounts owing
26 under the Pre-Petition Financing Documents (the "Pre-Petition Debt").

27 6. Pursuant to the terms of the Pre-Petition Financing Documents, the Pre-
28 Petition Debt is secured by, among other things, liens and security interests (the "Pre-Petition

1 Liens”) granted by the Debtor and the other Obligors on substantially all of their personal
2 property assets, including, without limitation, billed and unbilled accounts receivable and
3 disbursements and all proceeds, products and/or property received on account of or in
4 satisfaction thereof, all furniture, furnishings, fixtures, equipment and other tangible personal
5 property, the Operating and Suspense Accounts maintained with Citibank and all funds held
6 therein and all certificates and instruments, if any, representing or evidencing same (collectively,
7 the “Pre-Petition Collateral”), but such Pre-Petition Collateral excludes the Debtor’s Foreign
8 Cash and the Excluded Foreign Assets. The Debtor estimates that, as of the Filing Date, the
9 balance in the Operating Account was approximately \$4,755,694.

10 7. Since the Filing Date, Citibank and the Debtor have actively engaged in
11 negotiations regarding the wind-down of the Debtor’s business, and in that regard, the Debtor
12 has been using Cash Collateral and other Pre-Petition Collateral on a consensual basis to
13 effectuate the wind-down. Citibank has approved numerous expenditures requested by the
14 Debtor that have been funded from Cash Collateral, particularly where it was agreed between the
15 Debtor and Citibank that such expenditures were necessary to preserve and/or maximize the
16 value of the Debtor’s estate. Nevertheless, in light of the pending Involuntary Case, the Motion
17 to Dismiss and the fact that the Debtor is no longer an operating business, Citibank believes that
18 it is imperative that certain controls and limitations be put in place with respect to the Debtor’s
19 use of Cash Collateral during the pendency of the Involuntary Case and also that adequate
20 protection be provided to Citibank with respect to such use.

21 8. The attached Budget reflects discussions had between Citibank and the
22 Debtor with respect to the Debtor’s continued use of Cash Collateral, and Citibank believes that
23 the Debtor is in agreement with respect to the Budget and the form of Order. In any event,
24 Citibank believes that the relief requested in the Motion is fair, reasonable and appropriate, and
25 therefore should be approved, whether on a consensual or non-consensual basis.

26 **BASIS FOR RELIEF**

27 9. By this Motion, Citibank requests, pursuant to sections 105, 361 and 363
28 of the Bankruptcy Code and Bankruptcy Rule 2002, 4001 and 9014, that the Court allow the

1 Debtor to use Cash Collateral during the Term, but subject in all respects to the Budget and the
2 terms of the Order, including the Permitted Variance, and to grant adequate protection to
3 Citibank *nunc pro tunc* to the Filing Date on account of such use in the form of replacement liens
4 in the Post-Petition Collateral⁴ and superpriority claims as provided in the Order.

5 10. Although the Debtor requires the use of Cash Collateral to fund its wind-
6 down expenses, such use of Cash Collateral should be subject to reasonable limitations.
7 Moreover, the Debtor's use of Pre-Petition Collateral, including Cash Collateral, in which
8 Citibank has an interest should be conditioned upon the granting of adequate protection against
9 any diminution in the value of such Pre-Petition Collateral as a result of the Debtor's use thereof.
10 Citibank submits that the forms of adequate protection contemplated by the Order are fair and
11 reasonable under the circumstances. Citibank further submits that the Budget should enable the
12 Debtor to pay for services and expenses necessary to effectuate the wind-down in a manner
13 calculated to maximize the value of its estate. Accordingly, allowing the Debtor to use Cash
14 Collateral, subject to the Budget, and granting adequate protection with respect thereto, is in the
15 best interests of the Debtor's estate and its creditors.

16 11. Section 363(e) of the Bankruptcy Code provides that "on request of an
17 entity that has an interest in property . . . to be used, sold or leased, by the trustee, the court . . .
18 shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection
19 of such interest." 11 U.S.C. § 363(e). The purpose of adequate protection is to preserve the
20 creditor's position and to protect the secured creditor from diminution of the value of its interest
21 in collateral during the bankruptcy process. In re Worldcom, Inc., 304 B.R. 611, 618-19 (Bankr.
22 S.D.N.Y. 2004); In re Ledgmere Land Corp., 116 B.R. 338, 343 (Bankr. D. Mass. 1990).

23 12. Courts determine adequate protection for purposes of the Bankruptcy
24 Code on a flexible "case-by-case" basis. In re Swedeland Dev. Group, Inc., 16 F.3d 552, 564 (3d
25 Cir. 1994); see also In re O'Connor, 808 F.2d 1393, 1397 (10th Cir. 1987) (stating that "courts

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27 ⁴ As described in the Order, the Post-Petition Collateral includes the Debtor's Foreign Cash and any Excess Cash
28 generated by the Debtor's foreign affiliates (the "Foreign Affiliates").

1 have considered 'adequate protection' a concept which is to be decided flexibly on the proverbial
2 'case-by-case' basis"); In re Martin, 761 F.2d 472, 476 (8th Cir. 1985) ("[T]o encourage
3 reorganization, the courts must be flexible in applying the adequate protection standard."). The
4 purpose of adequate protection "is to ensure that the creditor receives the value for which he
5 bargained pre-bankruptcy." In re Swedeland Dev. Group, Inc., 16 F.3d at 564; see also In re
6 Hubbard Power & Light, 202 B.R. 680, 685 (Bankr. E.D.N.Y. 1996) (quoting In re 495 Cent.
7 Park Ave. Corp., 136 B.R. 626,631 (Bankr. S.D.N.Y. 1992) ("[t]he goal of adequate protection is
8 to safeguard the secured creditor from diminution in the value of its interests."); In re Sharon
9 Steel Corp., 159 B.R. 165, 169 (Bankr. W.D. Pa. 1993) ("The purpose of providing 'adequate
10 protection' is to [e]nsure that a secured creditor receives in value essentially what he bargained
11 for.").

12 13. As set forth in the Order, Citibank seeks to condition the Debtor's use of
13 Cash Collateral to the extent set forth in the Budget (subject to the Permitted Variance) and seeks
14 additional adequate protection as follows:

- 15 • The Debtor shall grant a valid, perfected and enforceable
16 replacement lien upon all Post-Petition Collateral, including the
17 Debtor's Foreign Cash and any Excess Cash, but subject to any
18 existing liens having priority over the Pre-Petition Liens, to the
19 rights afforded to any receiver or liquidator in respect of any
20 foreign receivership or liquidation proceedings and a
21 professional fee carve-out;
- 22 • Citibank shall also be granted a claim against the Debtor
23 entitled to priority pursuant to Section 507(b) of the
24 Bankruptcy Code to the extent the replacement liens are
25 insufficient to cover the diminution;⁵ and
- 26 • The Debtor shall pay, and Citibank shall also be entitled to
27 receive (and may offset amounts in the Operating and Suspense
28 Accounts to effectuate same), (a) post-petition interest at the

26 ⁵ Paragraph 8 of the Order provides for a section 506(c) waiver but only to the extent of the Diminution Amount
27 occurring during the Term. Consequently, we believe the Order complies with clause (4) of paragraph E of the
28 Guidelines for Cash Collateral & Financing Motions & Stipulations promulgated pursuant to B.L.R. 9029-1. We
would also point out that the Order provides for a \$50,000 carve-out for the fees and expenses of a chapter 7 trustee
(see *Interim Order* at paragraphs 6 & 8).

1 applicable contract rate, (b) reasonable attorneys fees and
2 expenses incurred in connection with the Involuntary Case, (c)
3 the L/C Reimbursement Payment and (d) the principal amount
4 of the Pre-Petition Debt as provided for in the Order or as
otherwise agreed, subject in the case of clauses (a) and (b) to
recharacterization under Section 506(b) of the Bankruptcy
Code.

5 14. Citibank believes that entry of the Order is necessary to ensure that
6 Citibank's interest in the Pre-Petition Collateral, including Cash Collateral, is adequately
7 protected during the pendency of this case. The Debtor has ceased operations and is liquidating
8 its business. Thus, the Debtor will not generate any material incremental revenue during the
9 pendency of the case. Accordingly, every expenditure by the Debtor poses the risk of
10 diminishing the value of the Pre-Petition Collateral, including Cash Collateral, and Citibank's
11 interest therein. Therefore, Citibank believes that it is reasonable and appropriate that
12 expenditures be strictly limited to those necessary to preserve or enhance the Debtor's estate,
13 either by minimizing liabilities or facilitating the recovery of assets and the collection of
14 receivables. In effect, conditioning the Debtor's use of Cash Collateral to the amounts set forth
15 in the Budget and on the terms of the proposed Order is essential to adequately protect Citibank's
16 interest in the Pre-Petition Collateral, including Cash Collateral, along with the other forms of
17 adequate protection sought to be provided herein. Moreover, Citibank believes that the amounts
18 set forth in the Budget should provide the Debtor with sufficient funding to pursue its wind-
19 down efforts in an orderly and efficient manner. Accordingly, Citibank submits that the Motion
20 should be approved.

21 15. The Motion also requests that the automatic stay imposed by virtue of
22 Section 362 of the Bankruptcy Code be vacated and modified insofar as necessary to permit the
23 Debtor or Citibank to (a) apply to the principal amount of the Pre-Petition Debt all monies
24 contained in the Suspense Account, (b) to pay all other amounts authorized to be paid to Citibank
25 pursuant to the Order, including the payment of any Post-Petition Interest and Case Fees,
26 (c) have made the L/C Reimbursement Payment and (d) take any action authorized or
27 contemplated by this Order and to carry out the terms thereof, subject, however, to the
28 satisfaction of any notice, procedural or other conditions contained in this Order. In addition to

1 the amounts set forth in the Order, if there are excess funds in the Operating Account that the
2 Debtor and Citibank agree may be applied by Citibank to repay the Pre-Petition Debt, then
3 Citibank shall be authorized hereunder to so apply such excess funds to reduce the principal
4 amount of the Pre-Petition Debt.

5 **INTERIM RELIEF**

6 16. Bankruptcy Rule 4001 provides that a final hearing on a motion with
7 respect to cash collateral may not be commenced earlier than 14 days after service of the motion.
8 If the motion so requests, however, the Court may conduct a preliminary hearing before such 14
9 day period expires and may authorize the conditional use of cash collateral and any related relief
10 as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

11 17. There is an urgent need to permit the Debtor to use Cash Collateral in
12 accordance with the Budget and to protect Citibank's interest in the Cash Collateral and other
13 Pre-Petition Collateral as set forth in the Order. It is therefore imperative that the Order be
14 entered on an interim basis pending a final hearing. Any delay could significantly impair the
15 wind-down efforts and further erode Citibank's interest in the Cash Collateral and any other Pre-
16 Petition Collateral.

17 **NOTICE**

18 18. No trustee, examiner or statutory committee has been appointed in this
19 Involuntary Case. Notice of this Motion and the interim hearing has been provided to the
20 following parties, or, in lieu thereof, their counsel: (a) the Office of the United States Trustee for
21 the Northern District of California; (b) the Debtor's twenty largest (20) unsecured creditors; (c)
22 counsel to the Petitioning Creditors and (d) all parties that have filed a motion of appearance in
23 this case. Notice of the Final Hearing shall be given as provided in the Order. Citibank submits
24 that, in light of the nature of the relief requested, no other or further notice need be given.

25 **NO PRIOR REQUEST**

26 19. No prior request for the relief sought herein has been made to this or any
27 other court.
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